

Order 2002-5-24

Served: May 29, 2002



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 28th day of May, 2002

Joint application of

**ATLAS AIR WORLDWIDE HOLDINGS, INC.,
AIRLINE ACQUISITION CORP. I,
ATLAS AIR, INC., and
POLAR AIR CARGO, INC.**

Docket OST-01-10239

for approval of a transfer of route authority under 49
U.S.C. 41105

FINAL ORDER

Background

On July 25, 2001, in accordance with the provisions of section 204.5 of our rules (14 CFR 204.5) that require air carriers to notify us of substantial changes affecting their operations, Atlas Air, Inc., and Polar Air Cargo, Inc., advised the Department that they had entered into an agreement whereby Atlas Air Worldwide Holdings, Inc. (AAWH), the parent of Atlas Air, would acquire all of the outstanding stock of Polar. Also on July 25, 2001, Atlas Air and Polar, together with related parties, jointly filed the subject application for a *de facto* transfer of Polar's authority to Polar under the control of AAWH.¹ The applicants note that while both Atlas Air and Polar will be subsidiaries of AAWH, each will remain separate airlines operated as such under separate brands.²

¹ By Order 2001-9-16, issued September 25, 2001, we granted the parties an exemption from section 41105 to the extent necessary to allow the acquisition of Polar to be completed prior to our action on the *de facto* transfer request. The Polar acquisition was consummated on November 1, 2001, and Polar is now a wholly-owned subsidiary of AAWH. (See Docket OST-01-10238.)

² Atlas Air currently holds certificate authority for both interstate and foreign scheduled air transportation of property and mail. Its foreign route authority is contained in its certificates for Route 637, which currently authorizes Atlas Air to serve 156 countries, and Route 801, which

By Order 2001-12-15, served December 19, 2001, we directed all interested persons to show cause why we should not issue an order (1) granting, with one exception, a *de facto* transfer under section 41105 of Title 49 of the United States Code (the Statute) of the certificate and exemption authority, together with related frequency allocations, held by Polar to Polar under the control of Atlas Air Worldwide Holdings, Inc. (AAWH), the holding company parent of Atlas Air; and (2) disapproving the *de facto* transfer of Polar's Brazil authority to Polar under the control of AAWH. Interested persons were given seven calendar days in which to file objections to our proposed actions.

On December 26, 2001, the Joint Applicants³ filed a limited objection to the Show Cause Order, while Gemini Air Cargo filed an answer in support of our proposed decision.

Specifically, the Joint Applicants object to that portion of the Department's proposed decision that would deny the *de facto* transfer of Polar's U.S.-Brazil authority to Polar under the control of AAWH. In support of this objection, the Joint Applicants argue that the transfer of Polar's Brazil rights is indeed consistent with the public interest and will further the Department's international aviation policy objectives. They further argue that they do not believe that the Department, in balancing the public interest factors, gave adequate consideration to the public benefits of the transfer.⁴ Nonetheless, the Joint Applicants request that, in the event we proceed to finalization of our decision not to approve the *de facto* transfer of Polar's Brazil authority, that we (1) clarify that Polar can continue to operate U.S.-Brazil service until such time as we have selected another carrier to replace Polar and that carrier has obtained the required authority from the Government of Brazil,⁵ and (2) allow Polar under the control of AAWH to continue

currently authorizes Atlas Air to serve Brazil. Polar also holds certificate authority to engage in interstate and foreign scheduled air transportation of property and mail. Its foreign route authority is contained in its permanent certificate for Route 651, which currently authorizes Polar to serve 97 countries, and in its temporary certificates for Route 696 (Brazil and Colombia), Route 705 (Thailand), and Route 727 (Japan). In addition, both Atlas Air and Polar hold exemption authority to serve additional countries.

³ The Joint Applicants consist of AAWH, Airline Acquisition Corp. I, Atlas Air, and Polar.

⁴ The Joint Applicants state that by refusing to transfer the Brazil authority, the Department is depriving the public of the substantial single-plane service benefits currently offered by Polar. They also express concern that the Department applied a higher standard to the transfer of Polar's authorities than exercised in prior Department decisions. In this regard they cite the Department's decision in the *Joint Application of Fine Air Services Corp. and Arrow Air, Inc.*, Order 2000-8-5, wherein the Department allowed the transfer of limited-entry U.S.-Ecuador authority as consistent with the public interest. (Joint Answer at 3-4.)

⁵ In this regard, the Joint Applicants request that Polar be permitted to retain its frequency allocation, subject to transfer to a replacement carrier to be selected by the Department. The Joint Applicants also request that the transfer be effected 60 days after notification to Polar and the Department that the transferee is prepared to commence services and has all the necessary

to hold certificate authority to serve Brazil (without the designation and frequencies it now holds), so that it may engage in cooperative working arrangements, such as a blocked-space, code-share arrangement, with Atlas Air.

Decision

We have decided to make final, with one exception, our tentative findings and conclusions in Order 2001-12-15.

In our show-cause order, we tentatively found that both applicants would continue to be fit and meet the citizenship standard of the statute, and that, overall, approval of the transaction was consistent with the public interest. We further tentatively found that the transaction would improve the viability of Polar, have a positive impact on Polar's workers, and have no negative impact on the viability of Atlas Air.

We also tentatively concluded that approval of the transaction with respect to Polar's U.S.-Brazil authority would not be consistent with the public interest as it would result in half of the available designations for all-cargo service and over half of the 24 available frequencies in the U.S.-Brazil market being under single corporate control. We, therefore, tentatively determined to (a) disapprove the *de facto* transfer with respect to Polar's U.S.-Brazil certificate authority and related designation and attendant frequencies; and (b) institute a separate proceeding to reallocate Polar's Brazil authority.

The Joint Applicants have not presented any information that would cause us to change our tentative finding in Order 2001-12-15. While they have argued that operations by the commonly controlled airlines in the Brazil market would offer important services to the public, the fact remains that U.S. carrier U.S.-Brazil all-cargo rights are limited both in terms of the number of airlines that may serve the country-pair market as well as the number of frequencies that these carriers collectively may operate. In these circumstances, we remain convinced, and the Joint Applicants have presented no evidence to persuade us otherwise, that the public interest is better served by ensuring that the Brazil market can be served by four unrelated airlines.⁶

However, the Joint Applicants have persuaded us that our objectives can be met without disapproving the transaction as it relates to Polar's underlying certificate authority, so that Polar could engage in certain code-share services with Atlas Air. The U.S.-Brazil Air Transport Agreement provides for same country blocked-space and code-share

U.S. and Brazilian government authority needed to operate the frequencies. (Joint Answer at 4, n. 2.)

⁶ The *Fine-Arrow Route Transfer* case cited by the Joint Applicants is inapposite. While the U.S.-Ecuador frequencies at issue in that case are also limited, the number of U.S. carriers that can serve the market is not limited and the number of jointly-held frequencies by the applicants in that case was considerably smaller than that at issue here.

services, and the authorization of such services does not use any of the limited U.S. carrier designations or an allocation of the limited number of available frequencies. Thus, such cooperative services by Polar under the control of AAWH would be permissible, provided that Polar held underlying economic authority to serve the U.S.-Brazil market. Furthermore, those operations would not affect our ability to reallocate the designation and frequencies held by Polar prior to its acquisition by AAWH. Therefore, to facilitate any such cooperative operations by Polar, we will revise our tentative decision to permit the transfer of pre-acquired Polar's underlying U.S.-Brazil certificate authority to Polar under the control of AAWH, absent the associated designation and frequencies.

Moreover, to the extent that our order to show cause did not make clear that Polar could continue to provide its Brazil operations until such time as the authority at issue has been awarded to another U.S. carrier and that carrier commences its services, we do so here. We will make, in this order, a separate, temporary award of the necessary authorizations to Polar for its interim operations, pending completion of the proceeding to reallocate Polar's U.S.-Brazil designation and frequencies.⁷

ACCORDINGLY:

1. Except as noted in Ordering Paragraph 2 below, we grant the *de facto* transfer of the certificate and exemption authority, together with related frequency allocations, held by Polar Air Cargo, Inc., to Polar Air Cargo, Inc., under the ownership of Atlas Air Worldwide Holdings, Inc.
2. We deny the *de facto* transfer of Polar Air Cargo, Inc.'s U.S.-Brazil designation and the related four weekly all-cargo frequencies to Polar Air Cargo, Inc., under the ownership of Atlas Air Worldwide Holdings, Inc.
3. We will institute by separate order a new U.S.-Brazil All-Cargo Service Case to reallocate the Brazil designation and frequencies currently held by Polar Air Cargo, Inc., to another U.S. certificated air carrier.
4. Effective on the date of service of this order, we withdraw the allocation of 4 weekly wide-body all-cargo frequencies now held by Polar Air Cargo, Inc.

⁷ In this regard, the Joint Applicants have requested that any reallocation provide sufficient time for transfer to the replacement carrier. It has been the Department's consistent policy to ensure an orderly transition of services in limited-entry markets in situations where the authority at issue transfers from one carrier to another. We will ensure that adequate provision is made in the proceeding reallocating Polar's rights for the orderly discontinuation of Polar's scheduled services in the market.

5. We allocate to Polar Air Cargo, Inc. (under the control of Atlas Air Worldwide Holdings, Inc.), on an interim basis, 4 weekly wide-body all-cargo frequencies for services in the U.S.-Brazil market.

6. The interim frequency allocation in ordering paragraph 5, above, will be effective immediately, and will remain in effect until final action by the Department in the proceeding to reallocate Polar Air Cargo, Inc.'s U.S.-Brazil designation and attendant frequencies.

7. The interim frequency allocation in ordering paragraph 5, above, is subject to the condition that any frequencies not used for a period of 90 days will revert automatically to the Department.⁸

8. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order shall become effective upon the 61st day after its submission for section 41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier.⁹

⁸ As Polar is currently serving the U.S.-Brazil market, the 90-day dormancy period will begin on the date of service of this order.

⁹ This order was submitted for section 41307 review on March 28, 2002. On May 28, 2002, we received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's order.

9. We will serve a copy of this order on the persons listed in Attachment A.

By:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
<http://dms.dot.gov>*

SERVICE LIST FOR DOCKET OST-01-10239

ALFRED J EICHENLAUB
SR VP & GENERAL COUNSEL
POLAR AIR CARGO INC
100 OCEANGATE #15-FLR
LONG BEACH CA 90902

STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVE NW
WASHINGTON DC 20036

BRUCE H RABINOVITZ
JEFFREY A MANLEY
COUNSEL FOR POLAR AIR CARGO
WILMER CUTLER & PICKERING
2445 M STREET NW
WASHINGTON DC 20037-1420

THOMAS G SCOTT SR
SR VP & GENERAL COUNSEL
ATLAS AIR INC
2000 WESTCHESTER ROAD
PURCHASE NY 10577-2543

RUSSELL E POMMER
ASSOC GENERAL COUNSEL &
DIR OF REGULATORY AFFAIRS
ATLAS AIR INC
901 15TH STREET NW STE 400
WASHINGTON DC 20005

MOFFETT B ROLLER
ROLLER & BAUER PLLC
COUNSEL FOR GEMINI AIR CARGO INC
1020 NINETEENTH STREET NW STE 400
WASHINGTON DC 20036

THOMAS V LYDON
DIR OF GOVT AFFAIRS
EVERGREEN INTL AIRLINES
1629 K STREET NW STE 301
WASHINGTON DC 20006

ANTHONY BAUCKHAM
PRESIDENT
EVERGREEN INTL AIRLINES
3850 THREE MILE LANE
MCMINNVILLE OR 97128

RICHARD P TAYLOR
DAVID H COBURN
COUNSEL FOR EVERGREEN INTL

